Filed 10/25/13 Norberg v. California Coastal Commission CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DONALD A. NORBERG as Trustee, etc.,	
Plaintiff and Appellant,	G047584
v.	(Super. Ct. No. 30-2010-00351770)
CALIFORNIA COASTAL COMMISSION et al.,	O P I N I O N
Defendants and Respondents.	

Appeal from an order of the Superior Court of Orange County, Luis A. Rodriguez, Judge. Affirmed. Request for judicial notice denied.

Gaines & Stacey, Sherman L. Stacey and Nanci S. Stacey for Plaintiff and Appellant.

Kamala D. Harris, Attorney General, John A. Saurenman, Assistant Attorney General, Jamee Jordan Patterson and Hayley Peterson, Deputy Attorneys General for Defendants and Respondents.

* * *

Donald A. Norberg, as trustee of The Norberg Family Trust (Norberg), appeals from an order discharging a peremptory writ of mandate. He claims the court erred in determining that the California Coastal Commission (Commission) complied with the peremptory writ of mandate directing it to take certain actions with respect Norberg's residential building permit application. The central issue in this case is the determination of the location of the bluff edge on Norberg's property, inasmuch as the building setback is measured from the bluff edge. Although the Commission's determination would allow Norberg to construct his desired semi-subterranean expansion of his existing dwelling, it would limit his construction of outdoor improvements. The conditions it imposed would also limit his irrigation of the bluff.

We are unpersuaded by Norberg's various arguments and conclude substantial evidence supports the Commission's finding that the bluff edge is located at the 103-foot elevation. We also conclude the Commission did not abuse its discretion in imposing either the setback conditions or the condition regarding the irrigation of Norberg's cliffside property. We affirm the order discharging the writ and deny the Commission's request for judicial notice.

I

FACTS

A. Background:

(1) Permit application—

Norberg represents that his family has owned certain residential property located at 86 South La Senda in Laguna Beach, California, in an area known as "Three Arch Bay," since the 1950's. He states that a 1,958-square-foot single-story dwelling was constructed on the property no later than 1962. He describes the property as bordering on the street on the northeast and the beach on the southwest. In 1995, Norberg obtained a permit from the Commission to expand the dwelling. However, the permit ultimately lapsed without any construction having been undertaken.

In 2009, Norberg filed a new permit application. He sought to remodel the existing dwelling and to add a new 860-square-foot semi-subterranean lower level within the footprint of the existing dwelling. In addition, he desired to add certain outdoor improvements, including a lower level paved patio, a spa, a shower and a spiral staircase. He also planned to make repairs to his existing 355 square-foot wood balcony deck.

In May 2010, the Commission approved a permit, subject to eight conditions. Condition Nos. 2, 4A, and 8 (later renumbered 7) are of particular note. Condition No. 2 required Norberg to agree not to make future use of bluff or shoreline protective devices to protect the new construction. Condition No. 4A required Norberg to submit revised plans "to provide a 5 foot setback from the bluff edge identified approximately at the 103 foot contour line for the proposed new ground level concrete patio . . . ." Condition No. 8 required Norberg to submit a report from a soils engineer or geologist with respect to watering limitations on the property and prohibited "watering of the bluff beyond the bluff edge at the 103 ft. contour . . . ."

(2) Writ proceedings—

(a) Issuance of peremptory writ

Norberg filed a petition for a writ of mandate against the Commission, challenging condition Nos. 2, 4A, and 8, among others. The court granted the petition as to condition Nos. 2 and 4A, and granted the petition in part with respect to condition No. 8.

In its October 4, 2011 minute order, the court observed, with respect to condition No. 2, that "*Public Resources Code Section 30253 specifically states* that new development should not 'in any way require the construction of protective *devices that would substantially alter natural landforms along bluffs and cliffs.*'" (Boldface omitted.) However, in drafting condition No. 2, the Commission had omitted the qualifying language regarding the substantial alteration of natural landforms. Consequently, the court ordered the Commission to set aside its decision approving condition No. 2.

The court further observed that condition No. 4A established a setback based on a bluff edge located at the 103-foot contour line rather than at the 84-foot contour line as proposed by Norberg. It stated that the definition of a bluff edge was set forth in California Code of Regulations, title 14, section 13577, subdivision (h). The court also said that it agreed with Norberg that the Commission's finding the bluff edge was located at 103 feet was not supported by substantial evidence. The court further stated that condition No. 8 was valid except to the extent that it found the bluff edge to be at the 103-foot contour line.

A judgment granting the petition for a peremptory writ of mandate was entered and on November 28, 2011. A peremptory writ of mandate was issued that same date. The Commission was directed to set aside permit condition Nos. 2 and 4A, and to modify condition No. 8 as set forth in the minute order. It was further directed to take such actions as reasonable and necessary to comply with the October 4, 2011 minute order. In addition, the Commission was directed to file a return to the peremptory writ of mandate within 60 days stating what it had done, and intended to do, to comply with the writ and also to file a supplemental return stating what final action the Commission had taken on Norberg's permit application, within 30 days after undertaking such final action.

(b) Discharge of peremptory writ

On February 7, 2012, the Commission filed a return in which it stated that it had determined not to file an appeal, that it would schedule a public hearing on the matter, that it would take evidence and take action consistent with the court's mandate, and that, following the public hearing, it would file a supplemental return informing the court of what had been done to comply with the writ.

In its July 23, 2012 supplemental return to the writ of mandate, the Commission reported that it had rescinded its conditional approval of Norberg's permit application and set aside conditions Nos. 2, 4A and 8, held a public hearing, and approved Coastal Development Permit 5-09-105 for Norberg's development. The

Commission stated that, having fully complied with the judgment, it requested that the peremptory writ of mandate be discharged.

In approving the permit, the Commission imposed a revised condition No. 2, reimposed condition No. 4A with additional findings, and reimposed the condition on irrigation, which was renumbered condition No. 7 (previously condition No. 8). Norberg filed objections to the return,[1] and requested that the court order the Commission to delete condition No. 4A, modify condition No. 7 to reflect a bluff edge at an elevation of 86 feet rather than 103 feet, and strike certain of the Commission's findings with respect to revised condition No. 2. Norberg asserted that the Commission had failed to comply with the writ, and instead simply had reimposed condition Nos. 4A and 7 after claiming to find by substantial evidence that the bluff edge was 103 feet. He argued that the Commission's finding the bluff edge was located at the 103-foot elevation was not supported by substantial evidence and that certain findings underlying modified condition No. 2 also were not supported by substantial evidence. He did not otherwise challenge revised condition No. 2.

The Commission filed a response to Norberg's objections, wherein it detailed the evidence it considered to determine that the bluff edge was at the 103-foot elevation. The court found that substantial evidence supported the Commission's determination that the bluff edge was located at the 103-foot elevation. The court observed that the Commission had detailed the reports and documents it relied upon and the reasoning it followed to make the determination. The court discharged the

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[1] Norberg also filed, on August 31, 2012, a second petition for a writ of mandate, in Case No. 30-2012-00595008. He claimed that the Commission had neither set aside the setback condition nor modified the irrigation condition, as ordered by the court, and had adopted unsupported findings with respect to the shoreline protection device waiver. He also asserted that the Commission has a practice of exceeding its jurisdiction by applying an "underground regulation," that is, by imposing a condition prohibiting the future use of shoreline protective devices. The second writ petition is not at issue in the matter before us.

peremptory writ of mandate, having found that the Commission demonstrated satisfactory compliance with it.

Norberg filed a notice of appeal from the order discharging the writ.[2]

II

DISCUSSION

A. Standard of Review:

"An 'aggrieved person,' which includes anyone who appears at a public hearing of the commission in connection with the decision or action appealed, may file a mandate petition seeking judicial review under Code of Civil Procedure section 1094.5. [Citations.] The trial court's responsibilities are as follows: 'In reviewing an agency's decision under Code of Civil Procedure section 1094.5, the trial court determines whether (1) the agency proceeded without, or in excess of, jurisdiction; (2) there was a fair hearing; and (3) the agency abused its discretion.' [Citations.] Code of Civil Procedure section 1094.5, subdivision (b) defines any abuse of discretion thusly, 'Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.' [Citations.]" (*Ross v. California Coastal Com.* (2011) 199 Cal.App.4th 900, 921.)

"The agency's findings and actions are presumed to be supported by substantial evidence. [Citations.] A person challenging an administrative determination bears the burden of showing the agency's findings are not supported by substantial evidence. [Citations.] When reviewing the agency's determination, the court examines the whole record and considers all relevant evidence, including that which detracts from the administrative decision. [Citations.] The Court of Appeal has held: 'Although this

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[2] The Commission also filed a notice of appeal from an August 16, 2012 award of attorney fees in favor of Norberg. That matter will be decided in the companion appeal, Case No. G047522.

task involves some weighing to fairly estimate the worth of the evidence, that limited weighing does not constitute independent review where the court substitutes its own findings and inferences for that of the Commission. Rather, it is for the Commission to weigh the preponderance of conflicting evidence, as [the court] may reverse its decision only if, based on the evidence before it, a reasonable person could not have reached the conclusion reached by it.' [Citations.] Our scope of review is identical to that of the trial court. [Citations.] We, like the trial court, examine all relevant materials in the entire administrative record to determine whether the agency's decision is supported by substantial evidence. [Citations.]" (*Ross v. California Coastal Com.*, *supra*, 199 Cal.App.4th at pp. 921-922.)

"On appeal from an order discharging a writ, the issue is whether the trial court erred in ruling that the respondent [in the writ proceedings] complied with the writ. Thus, our focus is on the [respondent's] response to the writ and the trial court's assessment of that response. [Citation.]" (*Los Angeles Internat. Charter High School v. Los Angeles Unified School Dist.* (2012) 209 Cal.App.4th 1348, 1355, fn. omitted; *City of Carmel-by-the-Sea v. Board of Supervisors* (1982) 137 Cal.App.3d 964, 972.)

B. Scope of Review:

(1) Writ compliance—

Norberg continues to attack the imposition of condition No. 4A, pertaining to the setback for outdoor improvements, and condition No. 7, pertaining to the irrigation of the bluff, and also challenges certain findings associated with condition No. 2, regarding the waiver of the right to construct certain shoreline protective devices. The only question on appeal is whether the trial court erred in ruling that the Commission complied with the writ. (*Los Angeles Internat. Charter High School v. Los Angeles Unified School Dist.*, *supra*, 209 Cal.App.4th at p. 1355; *City of Carmel-by-the-Sea v. Board of Supervisors*, *supra*, 137 Cal.App.3d at p. 972.) Although Norberg endeavors to

distract us from this reality by posing five questions for this court, at pages 8 to 9 of his opening brief, we do not render advisory opinions. (*Municipal Court v. Superior Court (Gonzalez)* (1993) 5 Cal.4th 1126, 1132.) We will address only the issues properly before us on appeal.

(2) Application of California Code of Regulations, title 14, section 13577, subdivision (h)—

We observe that one issue Norberg attempts to bring up repeatedly is whether the definition of "bluff edge" contained in California Code of Regulations, title 14, section 13577, subdivision (h) should govern in this matter. That is an issue we will not consider, for reasons made clear on a review of the procedural history of this case.

In his memorandum of points and authorities in support of his petition for a peremptory writ of mandate, Norberg stated: "There is not a dispute over the definition of 'bluff edge'. The definition is contained in California Code of Adm. Regs., Title 14, § 13577." He then proceeded to discuss how Felix Lim, his home designer, had applied the regulation to determine that the bluff edge was at an elevation of 84 feet, but that the Commission had found the bluff edge was at an elevation of 103 feet, based on the analysis of its staff geologist that the highest break in the slope was at the topmost of the garden walls. In his reply memorandum of points and authorities in support of his petition, Norberg reiterated that "the fact issue is the location of the edge of a coastal bluff based upon a regulatory definition." He again argued that the evidence supported a determination, pursuant to the definition contained in section 13577, that the bluff edge was located at the 84-foot elevation, not the 103-foot elevation.

In its October 4, 2011 minute order, the court noted that the definition of a "bluff edge" was found in California Code of Regulations, title 14, section 13577, subdivision (h)(2). The court then proceeded to quote the regulation. The court said the Commission's finding concerning the location of the bluff edge was "critical" and it concluded the finding that the bluff edge was located at the 103-foot elevation was not

supported by substantial evidence. In its judgment, the court ordered the Commission to set aside condition No. 4A and "to take such actions as may be reasonable and necessary to comply with the [minute order] issued on October 4, 2011."

In accordance with the judgment and the October 4, 2011 minute order, which stated that a determination of the location of the bluff edge, as defined in California Code of Regulations, title 14, section 13577, subdivision (h), was "critical," the Commission proceeded to obtain and review further information from its staff geologist, including the evidence supporting the staff geologist's opinion. Applying the section 13577 definition approved by the court, and reviewing the evidence, the Commission again came to the conclusion that the bluff edge was located at the 103-foot elevation. This time it discussed the supporting evidence in making its finding.

In his memorandum of points and authorities in support of his objections to the Commission's return, Norberg stated: "'Bluff edge' is defined in Calif. Code of Adm.Regs., Title 14, § 13577(h) . . . ." He then proceeded to quote the provision and argue why the Commission's finding the bluff edge was located at the 103-foot elevation was not supported by substantial evidence.

Having lost on that argument in the trial court, Norberg now argues for the first time, on appeal, that the definition of "bluff edge" contained in California Code of Regulations, title 14, section 13577, subdivision (h) is inapplicable, for various reasons. He brings his argument too late.

As a matter of general appellate procedure, an appellant cannot raise an argument for the first time on appeal. (*Hogan v. Country Villa Health Services* (2007) 148 Cal.App.4th 259, 269.) Furthermore, Norberg did not file an appeal from the judgment ordering the issuance of a peremptory writ of mandate, so he cannot now challenge its directives. (*Los Angeles Internat. Charter High School v. Los Angeles Unified School Dist.*, *supra*, 209 Cal.App.4th at pp. 1354-1355; *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 481; *Carroll v. Civil Service*

Commission (1970) 11 Cal.App.3d 727, 733.) On a related note, having previously agreed that California Code of Regulations, title 14, section 13577, subdivision (h) controlled the determination of the bluff edge location, as stated in the minute order, he cannot argue otherwise now. (*Talmo v. Civil Service Com.* (1991) 231 Cal.App.3d 210, 224; *Ballona Wetlands Land Trust v. City of Los Angeles, supra,* 201 Cal.App.4th at p. 481; cf. *Niles Freeman Equipment v. Joseph* (2008) 161 Cal.App.4th 765, 787 [failure to raise during administrative proceedings]; *City of Walnut Creek v. County of Contra Costa* (1980) 101 Cal.App.3d 1012, 1019-1021 [same].) Similarly, we may construe any error as invited error on Norberg's part. (*Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1685-1686.)

C. Legal Framework:

"The Coastal Act was adopted in 1976 and is codified at Public Resources Code section 30000 et seq. [Citations.] It has myriad purposes and goals and is a comprehensive scheme to govern coastal land use planning for the entire state. [Citations.]" (*Ross v. California Coastal Com., supra,* 199 Cal.App.4th at p. 923.)

Public Resources Code section 30251 requires, inter alia, that development along the coastline be designed "to minimize the alteration of natural land forms." The term "development" is defined to include "the placement or erection of any solid material or structure;" the grading or removing of any materials; the "change in the density or intensity of use of land . . . ;" and the "construction, reconstruction, demolition, or alteration of the size of any structure . . . ." (Pub. Resources Code, § 30106.)

Public Resources Code section 30253, at issue in this case, provides: "New development shall do all of the following: [¶] . . . [¶] (b) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and

cliffs." So, in issuing its permit and setting the conditions therefor, the Commission considered the mandate that Norberg's cliffside construction would maintain stability and structural integrity, would not cause or increase erosion or geologic instability, and would not "require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs." (Pub. Resources Code, § 30253.)

In so doing, the Commission considered the building setback, for each of the dwelling itself and the outdoor improvements, in relation to the edge of the bluff. Consequently, it was necessary to determine the location of the bluff edge.

California Code of Regulations, title 14, section 13577, subdivision (h) provides in pertinent part: "Bluff line or edge shall be defined as the upper termination of a bluff, cliff, or seacliff. In cases where the top edge of the cliff is rounded away from the face of the cliff as a result of erosional processes related to the presence of the steep cliff face, the bluff line or edge shall be defined as that point nearest the cliff beyond which the downward gradient of the surface increases more or less continuously until it reaches the general gradient of the cliff. *In a case where there is a steplike feature at the top of the cliff face, the landward edge of the topmost riser shall be taken to be the cliff edge*." (Cal. Code Regs., tit. 14, § 13577, subd. (h), italics added.)

D. Determination of Bluff Edge Location:

(1) Original Commission findings and peremptory writ—

On May 13, 2010, the Commission adopted certain findings. With respect to the location of the bluff edge, the findings acknowledged that Norberg's "site surveyor identified a bluff 'crest' generally located along the 72 foot to 80 foot contour elevation." However, based on the definition of "bluff edge" as contained in California Code of Regulations, title 14, section 13577, subdivision (h), "staff determines the bluff edge to be along the contour of the existing uppermost rock garden wall at approximately the 103 foot contour line. . . . The Commission staff geologist reviewed the topographic survey

of the site and determined the upper most break in slope to be at the upper most of the garden walls."

In its minute order dated October 4, 2011, the court stated: "The court agrees with [Norberg] the Commission[']s conclusion the bluff edge is 103 feet is not supported by substantial evidence but rather the generic and simplistic statements of non-testifying staff geologist. As pointed out the [administrative record] contains no memorandum, letters, e-mail or drawings as to what was relied on by this unidentified staff geologist. Juxtaposed against this oral hearsay is the substantial expert evidence of [Norberg] refuting the bluff line finding. [Record reference for undated letter from Lim.]"

(2) Determination on remand—

In response to the peremptory writ of mandate, and the October 4, 2011 minute order referenced therein, the Commission readdressed the location of the bluff edge, as defined in California Code of Regulations, title 14, section 13577, subdivision (h) on remand. It again determined that the bluff edge was located at the 103-foot elevation. Norberg asserts that the sole evidence the Commission relied upon on remand was an unsubstantiated memorandum by the Commission's staff geologist, Dr. Mark Johnsson, and that his memorandum does not constitute substantial evidence in support of the Commission's finding regarding the location of the bluff edge. We disagree on both points, for reasons we shall show.

(a) Evidence

(i) Johnsson memorandum

In his March 22, 2012 geotechnical review memorandum, Johnsson stated: "The coastal bluff at the site consists of a very steep sea cliff that extends from an elevation of approximately 86 feet to the beach below. The topographic survey submitted by [Norberg] identifies an 'edge of bluff' line near this point, although it cuts across contours and does not seem to correspond to the break in slope depicted by them. Above

this break in slope, a series of terraces separated by low walls *have been cut into the bluff*. . . . The uppermost wall is approximately coincident with the seaward edge of the existing deck at the site, and is at an elevation of approximately 103 feet. This is the top of the bluff, or the bluff edge, pursuant to CCR Title 14 § 13577(h), which states, in relevant part, that [¶] '[i]n a case *where there is a steplike feature at the top of the cliff face*, the landward edge of the topmost riser shall be taken to be the cliff edge.' [¶] This contour is more or less continuous with what I would identify as the bluff edge on the upcoast and downcoast properties . . . ." (Italics added.) Johnsson also stated that "[r]egardless of where the bluff edge may have been located before [the terraced] grading, it clearly now is at approximately 103 foot contour."

Johnsson identified a number of documents that he reviewed in performing his analysis. They included three reports and/or other documents from Geofirm, a letter from L.C. Smull, a letter from Felix Lim, and the site plans and topographic survey presented by Norberg.

(ii) Documents reviewed by Johnsson

The first of the five documents is an updated preliminary geotechnical investigation dated April 22, 2009, prepared for Norberg by Geofirm. Geofirm wrote that the site was "grossly stable, but that erosion of the fill and terrace materials behind the garden walls on the upper slope [might] occur episodically promoted by heavy rainfall and saturated conditions." Geofirm described the garden rock walls as having heights from three to five feet.

Geofirm also mentioned the property at 84 South La Senda, bordering Norberg's property on the north (and possessing a comparatively large patio area as observable in photographs in the record). Geofirm said that much of the backyard of the property at 84 South La Senda was located on fill placed over a former drainage gully, and that, historically speaking, infilling of that nature with scant remedial effort or compaction was "subject to eventual failure."

The second document was Geofirm's November 2, 2009 comments on the Commission's staff report condition No. 2. In that document, Geofirm opined that the proposed deepened foundation design would actually increase the dwelling's resistance to erosional threats.

Another of the documents was an undated letter Felix Lim wrote to the Commission on behalf of Norberg. Lim, who described himself as "an experienced designer of single family residences," opined that the bluff edge was at the 84-foot elevation, because the downward gradient of the surface increased more or less continuously from that point until it reached the general gradient of the cliff, and, in his view, this met the definition of bluff edge set forth in California Code of Regulations, title 14, section 13577, subdivision (h). Lim disagreed with the assertion that, pursuant to section 13577, subdivision (h), the bluff edge should be determined by the location of the uppermost terraced wall. He said: "Although there is a *terraced area* beneath a deck at the existing first floor, the terraced area is partially non[-]structural fill. *It is an altered condition* that appears to have existed as long as the house has been there *and is not an accurate depiction of the actual natural soil surface*." (Italics added.)

The documents also included a letter dated January 11, 2010 to Norberg from L.C. Smull, the owner of 88 South La Senda, located to the immediate south of Norberg's property. Smull wrote: "In 1992, there was a major slope failure on the oceanfront of homes located at 88, 90, 92, 94 and 96 South La Senda. The failure caused a massive slide of earth and rock onto the beach below. This severely damaged the foundations of several houses and the condemnation of the existing house at 94 South La Senda which had to be demolished. [¶] There also was a related collapse of a portion of the sewer tunnel along the cliff frontage which caused major repairs." He further stated: "From all of the geological reports that were obtained after the slide occurred to find out what caused the failure, there was one major theme that was mentioned—moisture. The dirt that was on top of the rock base below was wet. [¶] On or about October 22, 2009,

there was a slope failure on my slope at 88 South La Senda adjacent to the south of your property about ten feet above the beach. . . . I asked Geofirm to take a look at the problem to determine the cause if possible. The Geofirm response is outlined in their letter to you dated November 17, 2009, a copy of which is enclosed. This letter confirms that the slope on your property has 'significant free-running surface water'."

In the attached letter of November 17, 2009 addressed to Norberg, Geofirm wrote: "It has come to our attention that within the last two weeks a small, relatively shallow slope failure has occurred near the toe of the steeply descending bluff on the adjoining property to the south. [¶] During our site review we observed significant free running surface water on your portion of the slope adjacent to the failure. Based on our experience, the amount of water observed on your bluff face significantly reduces the local stability of onsite soils. Although such surficial instability may not pose an immediate risk to your existing improvements or residence above, progressive failures may eventually impact your site, and ongoing failures also pose a potential risk to persons on the beach below. [¶] . . . Therefore, our office recommends that the irrigation of onsite landscaping be reduced to minimize surface runoff and perching of groundwater on the underlying bedrock, which daylights on the bluff face. In an effort to effectively plan and manage site irrigation, our office recommends consulting with a landscape architect."

(iii) Additional documentation before the Commission

In addition to the aforementioned documents, the Commission had before it Geofirm's April 30, 2012 comment letter, in which Geofirm addressed what it referred to as "the landscape retaining wall." It stated: "Based on discussions with the homeowner, the landscape walls and terraces were artificially created by *cutting and filling the former natural slope*." (Italics added.)

Furthermore, Norberg himself sent the Commission a letter dated July 10, 2012. He wrote: "Behind the house above the top of the bluff was a gentle slope without any flat areas which we could use. To make the area more usable, in the 1950's and 1960's we put up several small walls to create level areas. You could view the ocean and sun yourself without feeling that you would be *sliding down a hill*. . . . [¶] None of these small walls was more than 3-4 feet high. They are not really retaining walls as they were put in without special engineering." (Italics added.) Norberg expressed confusion as to how the garden walls could have changed the bluff edge. However, he concluded, "if necessary, we will remove the walls and let the earth spread out *so that there are no level areas*." (Italics added.)

Finally, the Commission gave consideration to what it characterized as "unexpected bluff retreat episodes" that had occurred at four properties where coastal development permits had been issued previously.

(b) Commission's findings

In making its findings, the Commission specifically made note of Geofirm's opinion, as expressed in its April 22, 2009 geotechnical study, that the site was "considered to be grossly stable" and that "no faults were located on the property." The Commission also observed that Geofirm had reported: "*The bluff closest to the existing residence has been previously modified* with the construction of four backyard garden walls cut into the terrace deposits . . . . *These are subject to episodic erosion* from rainfall, sheet flow and weathering of the loose materials along the bluff top." (Italics added.)

The Commission also noted that Norberg had submitted a topographic survey marking a "bluff 'crest'" at the 72- to-80-foot contour elevation. However, the Commission observed that the "bluff line identified on the topographic survey cuts across contours and does not seem to correspond to the break in the slope depicted by them."

The Commission also evaluated Johnsson's March 22, 2012 memorandum. It specifically gave consideration to Johnsson's rationale for concluding that the bluff edge was at the 103-foot elevation, given the definition of "bluff edge" contained in California Code of Regulations, title 14, section 13577, subdivision (h). The Commission adopted Johnsson's viewpoint and found the bluff edge to be located at the 103-foot elevation.

(c) Analysis

(i) Substantial evidence

In making a substantial evidence determination, we resolve all reasonable doubts in favor of the findings and decision of the Commission. (*Paoli v. California Coastal Com.* (1986) 178 Cal.App.3d 544, 550.) Furthermore, we observe that staff reports are materials upon which the Commission is entitled to rely and that they may provide substantial evidence in support of the Commission's findings. (*Coastal Southwest Dev. Corp. v. California Coastal Zone Conservation Com.* (1976) 55 Cal.App.3d 525, 536.)

Here, the foregoing information shows there was substantial evidence to support the finding that the bluff edge was located at the 103-foot elevation. The opinion of Johnsson as the Commission's staff geologist was that, wherever the bluff edge may have been originally, pursuant to California Code of Regulations, title 14, section 13577, subdivision (h), the location of the bluff edge now had to be determined based on the terraces that had been cut into the slope and the walls that had been constructed thereon. In contrast, Lim, a "designer of single family residences," sought to ignore the portion of section 13577, subdivision (h) applicable when there are "steplike feature at the top of the cliff face." (Cal. Code Regs., tit. 14, § 13577, subd. (h).)

Norberg himself stated that without the terraces there were no level areas and one felt as if he or she were "sliding down a hill." Geofirm reported that the terraces had been "created by cutting and filling the former natural slope." Lim said the

artificially terraced area was "an altered condition . . . not an accurate depiction of the actual natural soil surface." That begs the question—once the terraces were cut and the walls erected, how could one accurately assess the former surface of the slope? We must agree with the Commission that once the surface was altered, the terraces were cut and the walls were erected, it was proper to apply the portion of the regulation applicable when there are "steplike feature[s] at the top of the cliff face." (Cal. Code Regs., tit. 14, § 13577, subd. (h).) Determined in this way, there is substantial evidence to show that the bluff edge, as defined in California Code of Regulations, title 14, section 13577, subdivision (h), was at the 103-foot elevation.

(ii) Norberg's arguments

Norberg disagrees. He contends it is the law of the case that the unsupported opinion by the unnamed staff geologist did not constitute substantial evidence that the bluff edge is at 103 feet. He says that on remand, the only additional evidence was the March 22, 2012 memorandum of Johnsson, "whose previous hearsay statements had not provided substantial evidence to support the designation of the bluff edge at elevation 103." Norberg asserts that the court erred in concluding that this one piece of evidence could constitute substantial evidence. He also says that expert opinion cannot constitute substantial evidence when not supported by evidence in the record.

In so stating, Norberg discounts the fact that when the Commission adopted the revised findings on remand, the staff geologist had been identified, had provided his analysis in a written report, and had supported that report by reference to a number of documents contained in the administrative record, including documents prepared by Norberg's own representatives. That evidence, as we have already discussed, constituted substantial evidence that the bluff edge should be placed at the 103-foot elevation, at the location of the uppermost garden wall.

Norberg chastises Johnsson for failing to accept the bluff edge designation, at about 86 feet, as marked on a topographic survey provided by Geofirm. Johnsson had

observed that the demarcation "cut[] across contours and [did] not seem to correspond to the break in slope depicted by them." Norberg claims that, in order to reach this conclusion, Johnsson made "speculations from an aerial photograph showing thick vegetation obscuring the cliff and upper slope . . . ." We disagree. Johnsson provided a lengthy technical critique of the topographic survey in question. Although he did comment that a determination the bluff edge was at the 103-foot elevation provided a continuous contour with both upcoast and downcoast properties as shown in a particular California Coastal Records Project image, this comment did not eviscerate his analysis of the topographic survey in question.

Norberg characterizes as "absurd" Johnsson's opinion that the portion of California Code of Regulations, title 14, section 13577, subdivision (h) pertaining to "steplike feature[s] at the top of the cliff face" defines the location of the bluff edge in this case. To interpret the statute this way, Norberg says, would be to make boundaries "weave in and out according to minor cuts between arbitrary property lines rather than the geologic structures described in [section]13577." Norberg ignores the fact that, as Lim stated on his behalf, the terraced area was "an altered condition . . . not an accurate depiction of the actual natural soil surface." Norberg does not explain how a determination of the natural geologic slope was to be made after he (or his family) had altered it with cut and filled terraces and walls.

He cites a page of the Commission's July 10, 2012 addendum, generated in response to communications from Norberg's legal counsel. He points out language of that addendum stating: "The Commission generally makes bluff-edge determinations consistent with the existing conditions of the natural landform." (Boldface and underscoring omitted.) He omits to discuss the succeeding language regarding the fact that natural landforms can be changed by a variety of methods, including "when a property-owner cuts into and removes natural materials during grading operations

resulting in a landward migration of the bluff-edge." (Boldface and underscoring omitted.)

Norberg also omits to mention the Commission's discussion of the materials provided by his own geologists—Geofirm. The Commission observed that Geofirm had provided a cross-section of the topography of Norberg's property, which depicted Geofirm's opinion of where the former natural profile of the site was, by using a dotted line portraying the former natural slope profile over the terraced areas. However, the Commission observed that Geofirm had provided no documentation to support its depiction of the former natural slope profile. Just as importantly, perhaps, the Commission also noted that if Geofirm's opinion as to the location of the former natural slope profile were correct, the existing residence would arguably protrude beyond the location of the natural bluff edge.

The Commission concluded that considering the lack of definitive evidence with respect to the former natural slope profile, it would be most consistent with California Code of Regulations, title 14, section 13577, subdivision (h) to determine the bluff edge to be at the 103-foot elevation. It indicated that this finding was beneficial to Norberg, because if it relied on the Geofirm depiction instead, it would conclude that the bluff edge was farther landward than the 103-foot elevation.

Norberg nonetheless argues that the purpose of bluff edge determinations is to assure stability and structural integrity, as required by Public Resources Code section 30253. He argues that the portion of California Code of Regulations, title 14, section 13577, subdivision (h) pertaining to "steplike feature[s] at the top of the cliff face" has nothing to do with stability and structural integrity and that the Commission cannot employ the section 13577, subdivision (h) definition of "bluff edge" to establish a setback requirement that has nothing to do with stability and structural integrity. This is particularly true, he argues, in the face of the Geofirm opinion that the site is stable. These arguments are all derivative of Norberg's current position that section 13577,

subdivision (h) should not govern and that the question on appeal should not be the one determined at the trial level—the location of the "bluff edge" from which the Commission establishes setbacks. As we have already explained, it is too late to make this argument.

E. Commission Concerns re Stability and Structural Integrity:

In any event, in imposing the conditions it did, it is clear the Commission was indeed concerned with stability and structural integrity. It provided background information explaining its concerns. The following information is taken from the June 21, 2012 staff report, later adopted by the Commission.

"Bluff stability has been an issue of historic concern throughout the City of Laguna Beach. The Commission has traditionally followed a set of setback and string-line policies as a means of limiting the encroachment of development seaward to the bluff edges on coastal bluffs and preventing the need for the construction of revetments and other engineered structures to protect new development on coastal bluffs."

"In the project vicinity, the Commission typically imposes either a minimum bluff edge setback of 25 feet from the edge of the bluff for primary structures (e.g. the enclosed living area of residential structures) and minimum of 5 to 10 foot setback for secondary structures (e.g., patios, decks, garden walls) or requires conformance with the stringline setbacks. . . . A stringline is the line drawn between the nearest adjacent corners of the residences that are adjacent to the subject property. A stringline setback allows an applicant to have a setback that averages the setback of the adjacent neighbors provided it is otherwise consistent with Coastal Act policies. . . . The structural stringline setback applies to enclosed structural area and the deck stringline applies to minor development such as patios and decks. . . . The intent of the setback is to substantially reduce the likelihood of proposed development becoming threatened *given the inherent uncertainty in predicting geologic processes in the future, and to allow*

for potential changes in bluff erosion rates as a result of rising sea level." (Italics added.)

"Although, the existing residence is located approximately 12 feet from the bluff edge, as identified by the Commission's staff geologist, the existing residence meets the stringline setback for principal structures along this segment of shoreline. . . . Due to the geologic stability present onsite, the Commission finds that a minimal geologic setback is appropriate in this case."

"Additionally, the Commission typically imposes a setback for hardscape/patio type development. . . . The proposed hardscape development includes a new approximately 36' long by 10' wide on-grade concrete patio with spa and outdoor shower to be constructed directly beneath an existing 27' long by 13' wide (355 sq. ft.) wood balcony deck and a half-spiral stair from the balcony down to the proposed new concrete patio. The existing wood balcony deck . . . overhangs the 103 contour line giving the existing wood balcony deck a zero (0) setback from where the Commission has identified the bluff edge."

"Although the proposed ground level concrete patio improvements meet the patio stringline, conformance solely with stringline would result in a zero (0) foot setback from the bluff edge. *While the rate of erosion is minimal at this site, a zero foot setback would not be adequate to accommodate even minimal erosion.* In Three Arch Bay, the Commission has found that in some cases, a 5-foot bluff edge setback is the minimum necessary for accessory structures . . . ; typically a 10-foot bluff edge setback is applied for accessory structures. The proposed new ground level patio improvements do not meet the minimum 5-foot bluff edge setback typically applied in this area for secondary structures. Therefore, the Commission imposes Special Condition 4 requiring revised final plans bringing all proposed ground level patio improvements into conformance with the minimum 5-foot bluff setback for accessory structures." (Italics added; boldface omitted.)

The staff report also discussed the information from Smull and Geofirm regarding neighboring slope failures in 1992 and 2009, the impact of Norberg's watering, and Geofirm's recommendation that Norberg reduce irrigation in consultation with a landscape architect. The staff report continued: "As seen from the past history of bluff erosion on the adjacent properties, surficial soils may slough off the bluff face, undermining the patio improvements proposed with a 0 ft. setback seaward of proposed residential addition. This is additional support for the minimal 5 ft. setback required through Special Condition 4. As stated above, *the proposed design would not accommodate even a minimal erosion rate and concerns from undermining of the patio could lead to requests for additional stabilization measures on the bluff face*." (Boldface omitted; italics added.)

"To further address potential instability of the on-site soils on the bluff related to significant amounts of irrigation, the Commission is requiring Special Condition 7. The condition requires a report from a soils engineer or geologist recommending irrigation watering limitations on the property. . . . However, as a preventative measure, the condition does not allow irrigation watering of the bluff beyond the bluff edge at the 103 ft. contour . . . ." (Boldface omitted.)

As we can see, Norberg's argument that the Commission's setback requirement was arbitrary and had nothing to do with stability and structural integrity is unfounded.

F. Condition No. 2 Findings:

(1) Revised condition No. 2A—

Public Resources Code section 30253, subdivision (b), as we recall, provides that any new development shall "[a]ssure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or *in any way require the construction of protective*

devices that would substantially alter natural landforms along bluffs and cliffs." (Italics added.)

Given this statutory mandate, the Commission's original condition No. 2A provided: "By acceptance of this Permit, [Norberg] agrees, on behalf of himself and all successors and assigns, that no bluff or shoreline protective device(s) shall ever be constructed to protect the development approved pursuant to Coastal Development Permit No. 5-09-105 . . . . By acceptance of this Permit, [Norberg] hereby waives, on behalf of himself and all successors and assigns, any rights to construct such devices that may exist under Public Resources Code Section 30235."[3]

In ordering the Commission to set aside condition No. 2A, the court emphasized the portion of Public Resources Code section 30253, subdivision (b) providing that new development shall not "require the construction of protective devices *that would substantially alter natural landforms along bluffs and cliffs*." (Italics added.) It noted that the Commission had improperly omitted the quoted, qualifying language.

On remand, the Commission revised condition No. 2A to read: "By acceptance of this Permit, [Norberg] agrees, on behalf of himself and all successors and assigns, that no bluff or shoreline protective device(s) *that would substantially alter natural landforms along bluffs and cliffs* shall ever be constructed to protect the development approved pursuant to Coastal Development Permit No. 5-09-105 . . . . By acceptance of this Permit, [Norberg] hereby waives, on behalf of himself and all successors and assigns, any rights to construct such devices *that would substantially alter natural landforms along bluffs and cliffs* that may exist under Public Resources Code

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[3] Public Resources Code section 30235 provides in pertinent part: "Revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline processes shall be permitted when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosion and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply."

Section 30235." (First italics added, second italics in original; boldface and underscoring omitted.) Norberg concedes that, on remand, the Commission complied with the writ.

(2) Language of staff report—

What Norberg attacks now is certain language contained in an addendum to a Commission staff report. As we shall show, the language in question was offered in response to correspondence from Norberg's attorney.

On remand, a June 21, 2012 staff report recommended the approval of Norberg's permit application subject to certain conditions. Those conditions included condition No. 2A, addressed above, and condition Nos. 2B and 2C, addressing what would happen if a government agency declared the improvements to be uninhabitable due to hazard or if the bluff edge receded to within five feet of the dwelling.

In his July 6, 2012 letter commenting on the staff report, Norberg's attorney stated that Norberg had a right to seek "a permit for a protective device that would not 'substantially alter natural landforms along bluffs and cliffs.'" However, the attorney construed condition Nos. 2B and 2C as precluding the right to seek a permit to construct such devices in the area between the 84-foot elevation and the 103-foot elevation.

The attorney wrote: "The [staff] findings acknowledge that the area lying between the 103 foot contour and approximately 84 foot contour has been substantially altered from the natural landforms with the pre Coastal Act installation of garden walls, terraces and a railroad tie stair. Any protective device Norberg might propose in this area would not 'alter natural landforms' as there are no natural landforms to be altered." These statements could be construed as an attempt on Norberg's part to obtain an advance determination that he could build unrestricted shoreline protective devices on the portion of the bluff situated between the 103-foot and 84-foot contour lines.

In response to the attorney's correspondence, the July 10, 2012 addendum to the staff report states: "As discussed . . . , much of the alteration between the 103 foot and 84 foot contours of the coastal bluff occurred without benefit of a coastal

development permit and are not pre-Coastal Act. Nevertheless, altering (grading) a coastal bluff does not turn it into an 'artificial landform,' it is still a natural landform—one that has been altered. An artificial landform is one that did not exist prior to grading (i.e., a landfill, an open pit mine, etc.)" (Italics, underscoring, boldface and fn. omitted.)

Norberg now challenges the last two sentences quoted above,[4] as he did in his objections to the Commission's return,[5] stating that they are inherently contradictory and that the plain meaning of the words "natural landform" cannot apply to Norberg's terraces. More importantly, Norberg argues: "If not stricken, this language will be used as administrative res judicata of the fact that [Norberg's] back yard is a natural landform. The purpose will be to deny some future project to the rear of the house on the grounds that the altered land surface is actually a natural landform. . . . The effect of the finding is to avoid the trial court's unchallenged construction of Public Resources Code § 30253 and to reinstate the practical effect of prior Special Condition No. 2."

We disagree. It is undisputed that the Commission complied with the peremptory writ of mandate when it revised condition No. 2A to prohibit only "bluff or shoreline protective device(s) that would substantially alter natural landforms along bluffs and cliffs." As we have already discussed, the fact that the bluff has been landscaped with terraces affects the way in which the location of the bluff edge is determined under California Code of Regulations, title 14, section 13577, subdivision (h). However, that regulation does not define "natural landforms" for the purposes of Public Resources Code section 30253. Moreover, just because the bluff has been landscaped with terraces, that does not mean it has been transformed into something other than a natural landform the Coastal Act was designed to protect. (Pub. Resources Code,

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4 Condition Nos. 2B and 2C are not at issue on appeal.

5 In ruling that the Commission had complied with the writ, the court did not specifically respond to Norberg's attack on the language in the addendum to the staff report.

§ 30251.) We cannot say, for example, that if Norberg wanted to cut deep into the rock at the 84-foot contour line and construct a massive retaining wall to protect his patio, it should be a foregone conclusion that he has an unfettered right to do so on the theory that the bluff is no longer a natural landform. The application of unchallenged condition No. 2A to such facts as may develop in the future is a matter left for another day.

In short, Norberg has not met his burden to show that the wording of the July 10, 2012 addendum should be stricken.

G. Request for Judicial Notice:

The Commission has filed a request for judicial notice. It draws to this court's attention the fact that Norberg is raising certain issues on appeal that he did not raise in the trial court, related to whether California Code of Regulations, title 14, section 13577, subdivision (h) governs at this point. The Commission requests that if we choose to address those issues, then we take judicial notice of a January 16, 2003 memorandum by Johnsson addressed to the Commission and an excerpt from the City of Laguna Beach Land Use Element.

Norberg has not filed an opposition, as permitted by California Rules of Court, rule 8.54(a)(3). The failure to timely file an opposition "may be deemed a consent to the granting of the motion." (Cal. Rules of Court, rule 8.54(c).) Norberg seeks to circumvent the application of this rule by including untimely objections to the request for judicial notice in his appellant's reply brief. Norberg has not followed proper procedure in presenting his objections and we need not consider them.

Nonetheless, we find his objections to be quite interesting. We observe that Norberg's appellant's appendix already contains his favorite two pages out of Johnsson's 23-page memorandum. Those two pages were attached to a July 6, 2012 letter from Norberg's attorney to the Commission. However, when it comes to the suggestion that the court take judicial notice of the entire memorandum, not just the selected portions,

Norberg claims that Johnsson's memorandum constitutes neither an official record of the Commission nor a formal policy of the Commission. He contends it is not properly the subject of judicial notice. Norberg just wants us to consider in isolation the two pages of the memorandum he views as favoring his position because he was able to get those two pages, unencumbered by the other 21, into the appellant's appendix.

No matter. As we have said already, we will not consider the issues Norberg raises for the first time on appeal. Consequently, we need not address the propriety of taking judicial notice of the documents in question. They are irrelevant to the matters at issue on appeal, so we deny the request for judicial notice. (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 544, fn. 4; *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1135, fn. 1.)

III

DISPOSITION

The order discharging the writ is affirmed. The request for judicial notice is denied. The Commission shall recover its costs on appeal.

MOORE, ACTING P. J.

WE CONCUR:

FYBEL, J.

THOMPSON, J.